principles involved were much the same, especially as to the validity of an instrument, viz. the charge on the pratanabats.

The charge on the pratanabats was "incapable of creation" except under conditions which have not been fulfilled, viz, the obtaining of the sanction. I know of no equitable doctrine which will go to the length of recognizing as valid, something which was invalid *ab initio*.

The creditor company when accepting the debenture, should have been satisfied that the necessary formalities required by Siamese law had been complied with. If they accepted a charge which so far as the pratanabats were concerned, was a nullity according to the *lex situs*, I do not consider it is within the province of this Court to attempt to override the *lex situs*.

Following the case of *Kent Coast Railway* v. *London Chatham and Dover Railway Co., (supra)*, I hold that the charge on the pratanabats never existed. I therefore fail to see how I can be asked to give effect to it.

I make the following orders upon the two matters submitted:—

(a) On the liquidation of Huey Yet Tin Dredging Ltd., Bun Tin Lum Co., Ltd., was not entitled to enforce in or through the Courts of the Federated Malay States an equitable charge against the pratanabats.

(b) The proceeds of sale of the property of Huey Yet Tin Dredging Ltd., other than that portion thereof apportionable to the movable property (which it is admitted was properly charged by the debenture) are to be applied in satisfaction of the claims of the creditors generally.

With regard to the costs of this summons; in view of the complexity and importance of the issue, and the uncertainty of the law—no similar point having arisen in any of the cases to which reference has been made—which made it essential that one or other party should apply to this Court for directions, by consent of both parties through their counsel, I assess the costs at $500: $250.00 to be paid to each party.

Under Section 192 of the Companies Enactment. I order that these costs be paid by the liquidator out of the assets of Huey Yet Tin Dredging Limited.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

MUDIE, J.

September 25, 1934.

IN RE S.M.R.M. SITHAMPARAM CHETTIAR *EX PARTE* SUNDRA SINGH.

[NEGRI SEMBILAN BANKRUPTCY No. 9 of 1934]

Bankruptcy — Bankruptcy Notice — "Final Decree" — The Bankruptcy Enactment, 1912, section 4 (i) (i) — The Civil Procedure Code, 1918, section 246.

Under Sub-section (i) (i) of section 4 of the Bankruptcy Enactment, 1912, the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment and consequently, when the decree has been made more than one year previously, the creditor is not entitled to issue a bankruptcy notice against the judgment-debtor, unless he has obtained leave from the Court, under section 246 of the Civil Procedure Code, 1918, to issue execution on the decree.

S. M. Sharma for the creditor.

F. A. P. Wright for the debtor.

Cur. Ad. Vult.

MUDIE, J.—This is a motion to set aside a Bankruptcy Notice which was issued on the 2nd day of August, 1934, on two grounds.

The first is that, when the respondent applied for the issue of the Notice, he did not produce to the Registrar an office copy of the judgment on which the notice was founded, and thereby failed to comply with Rule 91 of the Bankruptcy Rules, which reads as follows:—

> "A creditor desirous that a bankruptcy notice may be issued shall produce to the Registrar an office copy of the judgment on which the notice is founded and file the notice together with a request for issue which shall be in Form No. 4 in the Appendix with such variations as circumstances may require. The creditor shall at the same time lodge with the Registrar two copies of the bankruptcy notice to be sealed and issued for service and a copy for transmission to the Official Assignee which copy the Registrar shall forthwith send by post or otherwise to the Official Assignee."

It is contended that failure to comply with the Rule renders the Notice bad.

A Bankruptcy Notice, founded on this same judgment, was issued by the respondent on the 2nd of May, 1934, and served on the debtor. It was set aside on the application of the debtor on the ground that the amount stated to be due in the Notice was not correct.

When that Notice was issued an office copy was produced to the Registrar and filed in Court with the request.

The debtor then applied for the issue of a fresh Notice, which was issued without requiring an office copy of the judgment to be produced a second time.

The object of the Rule is that the Registrar may be satisfied that the conditions requisite for the issue of a Bankruptcy Notice obtain. As the Registrar was satisfied when the office copy was produced on the first application, I am of opinion that the Rule has been sufficiently complied with.

Even if it has not been complied with, it is clear that the debtor has not been prejudiced in the slightest degree, and that the proceeding is protected by section 122 of the Bankruptcy Enactment, 1912, which reads as follows:—

"No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court."

Rule 285 is also relevant.

"285. Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceedings may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit."

In my opinion the application cannot succeed on the first ground.

The second ground is that the creditor is not in a position to proceed with the execution.

The date of the judgment on which the Bankruptcy Notice is founded is the 21st day of November, 1932. After the expiration of a year from that date the creditor is unable to obtain execution without the leave of the Court under the provisions of sections 246 and 247 of the Civil Procedure Code, 1918. No application for leave has been made.

It is argued that this amounts to a stay of execution, and that the Bankruptcy Notice ought not to have been issued.

It is clear from secton 4 (i) (*i*) and 4 (ii), Rule 90, read with the prescribed Forms Nos. 4 and 5 that a Bankruptcy Notice cannot issue where execution on the judgment has been stayed.

It is argued for the respondent that no order for a stay of execution has been made, and that section 246 of the Civil Procedure Code has no application.

This point was considered by the Court of Appeal in *Ex parte Woodall, In re Woodall*, 13 Q.B.D. 479, where it was held that the executor of a creditor who has obtained a final judgment is not entitled to issue a bankruptcy notice against the judgment debtor, unless he has obtained leave from the Court, under rule 23 of Order XLII of the Rules of the Supreme Court of 1883, to issue execution on the judgment. Under sub-section 1 (g) of section 4 of the Bankruptcy Act, 1883, the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment.

In *Ex parte Ide, In re Ide*, 17 Q.B.D. 755, the Court of Appeal decided that where a creditor has obtained judgment against a firm, but has not obtained the requisite leave under Order XLII., rule 10, to issue execution against a person alleged to be a member of the firm, he cannot serve such person with a notice under the Bankruptcy Act, 1883 (46 and 47 Vic. c. 52), section 4, sub-section 1 (g), which enables a creditor who has obtained final judgment against a debtor, "execution thereon not having been stayed," to issue a notice requiring the debtor to pay or secure the debt.

The following passage appears in the judgment of Bowen, L.J., at page 759:

"With regard to the construction of sub-section 1 (g) of section 4, I also agree that, in order to entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when he issues the bankruptcy notice. It would be absurd to suppose that sub-section 1 (g) admitted of this construction that in a case in which execution could have gone at once, but for the order of the Court staying it, a bankruptcy notice could not be issued, and yet that, in a case in which execution could never have gone at all without the leave of the Court, a bankruptcy notice could be issued, and the debtor could be adjudged a bankrupt. We must look carefully at the words to see if there is not an implication to be found in them, and it seems to me that, from the collocation of the words 'final judgment' and 'execution thereon not having been stayed,' a necessary implication arises of this character, viz., that the creditor must not merely have obtained a final judgment but must be in a position to issue immediate execution upon it."

On these authorities I am of opinion that the applicant must succeed on the second ground.

The motion will be allowed with costs. There will be an order setting aside the Bankruptcy Notice.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

THOMAS, C.J.

NOVEMBER 21, 1934.

KIRTHA SINGH alias KARTHAR SINGH **Plaintiff.**

v.

KABUL SINGH .....**Defendant.**

[SELANGOR CIVIL SUIT No. 193 of 1934]

The Civil Procedure Code, 1918, section 492—Arrest before Judgment—Action for damages—Malice—Termination of proceedings.

When an order of Court for arrest before judgment is obtained maliciously and without reasonable and probable cause, the Court, in dealing with a subsequent claim for damages on account of the arrest, is entitled to go into the circumstances under which the order was obtained and, where the circumstances or the merits are in favour of the plaintiff, to treat the order as though it had been discharged in his favour.

Decision in *Yap Piang* v. *Wong Lee Nam* (1931—1932) F.M.S.L.R. 367; 2 Mal. L.J. 102, followed.

A. J. Bostock-Hill and *S. M. Sharma* for the plaintiff.